

**STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD**

DIVISION OF WATER RIGHTS

**TEMPORARY PERMIT FOR
DIVERSION AND USE OF WATER**

TEMPORARY PERMIT 21163

Application T031449 of **Monterey Peninsula Water Management District
P.O. Box 85
Monterey, CA 93942-0085**

filed on **August 8, 2003**, has been approved by the State Water Resources Control Board (SWRCB)
SUBJECT TO PRIOR RIGHTS and to the limitations and conditions of this permit.

In Order WR 95-10, the SWRCB found that the California-American Water Company (Cal-Am) was illegally diverting water from the Carmel River and ordered Cal-Am to diligently implement actions to terminate its unlawful diversions. Such actions include contracting with another agency (such as Monterey Peninsula Water Management District (MPWMD)) having appropriate rights to divert and use water from the Carmel River.

One option for complying with Order WR 95-10 is offstream storage of Carmel River water in the Seaside Groundwater Basin. After evaluating the water supply alternatives, the California Public Utilities Commission has selected offstream storage as a key component in the long-term water supply contingency plan (Plan B) for the Monterey Peninsula.

During the period January 7, 2004 through May 31, 2004, MPWMD has an urgent need to store Carmel River water in the Seaside Groundwater Basin in order to continue its pilot feasibility study of this water supply alternative.

MPWMD filed a temporary permit application on September 6, 2003. The SWRCB notified the public of the temporary permit application on October 17, 2003. The comment period for the notice ended on November 14, 2003. However, Clinton and Margaret Eastwood were granted an extension to December 17, 2003 to submit an objection, due to late receipt of the notice.

The SWRCB finds that: (1) the applicant has an urgent need for the water to be diverted and used; (2) the water will be diverted and used without injury to any lawful user of water; (3) the water will be diverted and used without unreasonable effect upon fish, wildlife, or other instream beneficial uses; and (4) the proposed diversion and use is in the public interest.

There is no injury to prior right holders. This finding is based on the following: (1) This temporary permit is junior to all legal existing Carmel River diversions and (2) MPWMD's proposed diversion is subject to specified bypass flows throughout the Carmel River, as identified in the temporary permit. Therefore, all existing demands for water must necessarily be satisfied before MPWMD can divert water under this permit.

The water will be diverted and used without unreasonable effect upon fish, wildlife, or other instream beneficial uses. The bypass flows required by this permit are extracted from the report titled Instream Flow Needs for Steelhead in the Carmel River, Bypass Flow Recommendations for Water Supply Projects using Carmel River Waters (National Marine Fisheries Service (NOAA Fisheries), Southwest Region, Santa Rosa Field Office, June 3, 2002). NOAA Fisheries has determined these flows provide adequate protection for fish.

The proposed diversion and use is in the public interest because it furthers progress in complying with Order WR 95-10 in developing a legal water supply for the Monterey Peninsula. Utilizing Carmel River winter flows, in excess of those needed to serve prior rights and public trust resources, furthers the constitutional policy that water resources of the state be put to beneficial use to the fullest extent of which they are capable.

The SWRCB received the following objections to issuance of a temporary permit:

Objection of Cal-Am:

- (1) Cal-Am supports the continuation of the pilot 750 acre-feet (af) aquifer storage and recovery project; however, Cal-Am questions the appropriateness of utilizing a temporary urgency permit for this purpose. This is the seventh temporary permit for the project.

Water Code section 1425 et seq. does not limit the number of times an applicant may file for a temporary permit provided the applicant meets the requirements of the Water Code. Nevertheless, the Division of Water Rights (Division) concurs that long-term continuous activities should undergo the reviews associated with normal application processing procedures. However, in this case, because the purpose of this diversion is to test the feasibility of off-stream groundwater storage, the Division believes that a temporary permit is appropriate.

- (2) Cal-Am questions the appropriateness of MPWMD being the permittee with respect to any aquifer storage and recovery project since MPWMD neither owns nor operates any of the relevant diversion or conveyance facilities nor is it able to put water to reasonable beneficial use.

The temporary permit will be conditioned to reflect the fact that the permit does not grant access to diversion and water delivery facilities owned by Cal-Am.

- (3) Since the granting of MPWMD's last temporary urgency permit, the SWRCB has rejected MPWMD's petition to transform its permits for on-stream storage into permits for an aquifer storage and recovery project. Accordingly, MPWMD cannot proceed with a long-term project.

This issue is not a valid basis for objection to issuance of a temporary permit.

- (4) Since the granting of MPWMD's last temporary urgency permit, an adjudication of the Seaside Groundwater Basin has been initiated: *California American Water v. City of Seaside, et al.*, Monterey Superior Court, Case No. M66343.

Issuance of a temporary permit does not create a vested right, even of a temporary nature. Furthermore, the permittee will only be authorized to divert from groundwater storage an equivalent amount of water to that which the permittee first injects into the groundwater basin, less losses. There will be no net negative change in groundwater storage.

- (5) The SWRCB should consider as part of the instant process or in any related process the benefit of Cal-Am being the water right applicant.

This issue is not a valid basis for objection to issuance of a temporary permit.

Objection of Clinton Eastwood and Margaret Eastwood:

- (1) The Eastwoods question that appropriateness of utilizing a temporary permit for this purpose because it is the seventh temporary permit. See response (1) to Cal-Am, above.
- (2) The MPWMD has failed to conduct appropriate review of its long-term project under the California Environmental Quality Act (CEQA). MPWMD has engaged in impermissible piecemealing of this project by filing a series of applications for temporary permits in order to avoid proper environmental review under CEQA.

Under provisions of CEQA, the City of Seaside (City) is the Lead Agency for the Project. The City has prepared and circulated an Initial Study and a proposed Negative Declaration. The review period ended on April 10, 2000. A public hearing was held to consider any comments received. The City issued a Negative Declaration and filed a Notice of Determination with the Monterey County Clerk on April 18, 2000. Subsequently, MPWMD prepared and filed a Notice of Exemption (NOE) pursuant to CEQA Guidelines section 15262, Feasibility and Planning Studies on August 18, 2003 with the Office of Planning and Research and the Monterey County Clerk. The Eastwoods maintain that exemption does not apply since section 15262 applies to those projects involving "only" feasibility or planning studies for possible future actions. Here, MPWMD is also using some of the water diverted for municipal uses within the service boundary of Cal-Am.

Section 15262 of the CEQA guidelines states that an exemption may apply if,

A project involving only feasibility or planning studies for possible future actions which the agency, board, or commission has not approved, adopted, or funded does not require the preparation of an EIR or Negative Declaration but does require consideration of environmental factors. This section does not apply to the adoption of a plan that will have a legally binding effect on later activities.

The SWRCB, Division of Water Rights could not find any reference to the exclusion of municipal use within the identified code section. The text indicates the exemption is valid provided the project is a feasibility or planning study. Once MPWMD injects the water into the aquifer, the water may eventually be used for some beneficial purpose. In order to determine if the water could be used for municipal uses on a long-term basis (planning study), MPWMD would attempt (feasibility determination) to deliver the water to municipal sources while considering water quality and economic considerations.

The SWRCB, as responsible agency, is issuing a Notice of Determination based on the Negative Declaration prepared by the City. Furthermore, as a responsible agency, the SWRCB is not the correct party for resolving challenges regarding the adequacy of a CEQA finding issued by a lead agency or to resolve the piecemealing issue raised by the objector. Such challenges must be addressed using the procedures set forth in the CEQA guidelines.

- (3) MPWMD proposes to divert water during times the SWRCB has declared the Carmel River fully appropriated, and therefore MPWMD's project may result in injury to other water users including

Clinton and Margaret Eastwood, and also result in a significant impact on fish, wildlife, or other instream beneficial uses.

While the Eastwoods are correct about the Carmel River's fully appropriated status, Water Code section 1206(a) that prohibits the SWRCB from accepting applications that are not in accord with the SWRCB's Declaration of Fully Appropriated Streams, does not apply to temporary permits. (Wat. Code, § 1206(c).)

The notice of the temporary permit application states that MPWMD has agreed to include the bypass flows identified by NOAA Fisheries as applicable for the Carmel River in any permit issued. The objector does not identify what, if any, impact may occur to public trust resources and prior rights after taking the agreed upon bypass flow regime into consideration. The SWRCB, Division of Water Rights concludes that the bypass flow condition of the temporary permit adequately protects public trust resources and prior rights.

- (4) The MPWMD project involves the diversion of 750 af of water. Diversions of this size are defined as a major project and require the filing of a major permit application.

The submittal requirements for a major permit application vary from the requirements for a minor application in only one area. The maps for a major application must conform to Title 23, California Code of Regulations (CCR), section 717 in addition to all other applicable map criteria. MPWMD complied with CCR section 717 by incorporating maps previously filed with the SWRCB in Application T31449 by reference.

- (5) The environmental impacts of MPWMD's project must be examined in light of the request to adjudicate the Seaside groundwater basin, *California American Water v. City of Seaside, et al.*, Monterey Superior Court, Case No. M66343.

See response (4) to Cal-Am, above. As noted previously, issuance of this temporary permit is conditioned upon compliance with a permit condition regarding Carmel River bypass flows.

Permittee is hereby authorized to divert and use water as follows:

1. Source of water

Source

- (1) Carmel River
(2) Carmel River (Subterranean Stream)

Tributary to

- Pacific Ocean
Pacific Ocean

within the County of **Monterey**.

2. Location of points of diversion and redirection

By California Coordinate System of 1927 in Zone 4	40-acre subdivision of public land survey or projection thereof	Section (Projected)	Township	Range	Base and Meridian
(1) San Clemente Dam; North 412,600 feet and East 1,203,650 feet	NW¼ of SW¼	24	17S	2E	MD
(2) Canada Well; North 451,600 feet	NE¼ of SW¼	17	16S	1E	MD

and East 1,153,800 feet					
(2) San Carlos Well; North 451,250 feet and East 1,156,600 feet	NE¼ of SE¼	17	16S	1E	MD
(2) Cypress Well; North 447,200 feet and East 1,163,250 feet	SW¼ of NW¼	22	16S	1E	MD
(2) Pearce Well; North 446,950 feet and East 1,164,750 feet	SE¼ of NW¼	22	16S	1E	MD
(2) Schulte Well; North 447,000 feet and East 1,167,850 feet	SW¼ of NW¼	23	16S	1E	MD
(2) Manor #2 Well; North 446,050 feet and East 1,169,950 feet	NE¼ of SW¼	23	16S	1E	MD
(2) Begonia #2 Well; North 445,100 feet and East 1,173,350 feet	NW¼ of SW¼	24	16S	1E	MD
(2) Berwick #7 Well; North 444,050 feet and East 1,173,900 feet	SW¼ of SW¼	24	16S	1E	MD
(2) Berwick #8 Well; North 444,100 feet and East 1,174,700 feet	SE¼ of SW¼	24	16S	1E	MD
(2) Scarlett #8 Well; North 444,100 feet and East 1,179,200 feet	SW¼ of SW¼	19	16S	2E	MD
(2) Los Laureles #5 Well; North 439,900 feet and East 1,187,200 feet	NW¼ of SE¼	29	16S	2E	MD
(2) Los Laureles #6 Well; North 439,100 feet and East 1,188,050 feet	SE¼ of SE¼	29	16S	2E	MD
(2) West Garzas #4 Well; North 434,850 feet and East 1,190,800 feet	NE¼ of SW¼	33	16S	2E	MD
(2) Garzas Creek #3 Well; North 433,200 feet and East 1,191,650 feet	SW¼ of SE¼	33	16S	2E	MD
(2) Panetta #2 Well; North 431,700 feet and East 1,193,350 feet	NW¼ of NW¼	3	17S	2E	MD
(2) Panetta #1 Well; North 431,550 feet and East 1,193,250 feet	NW¼ of NW¼	3	17S	2E	MD
(2) Robles #3 Well; North 426,700 feet and East 1,198,100 feet	NE¼ of NE¼	10	17S	2E	MD
(2) Russell #4 Well; North 421,400 feet and East 1,202,650 feet	SW¼ of SE¼	14	17S	2E	MD
(2) Russell #2 Well; North 421,000	SE¼ of SE¼	14	17S	2E	MD

feet and East 1,202,650 feet					
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Point of Rediversion: Paso Robles Test Injection Well; North 480,600 feet and East 1,173,300 feet	NE¼ of NE¼	23	15S	1E	MD
Point of Rediversion: Santa Margarita Test Injection Well; North 480,550 feet and East 1,173,700 feet	NE¼ of NE¼	23	15S	1E	MD
Point of Rediversion: Ord Grove #1 Well; North 479,850 feet and East 1,172,150 feet	NW¼ of NE¼	23	15S	1E	MD

3. Purpose of use	4. Place of use	Section (Projected)	Township	Range	Base and Meridian	Acres
Municipal	110,000 acres within the boundaries of MPWMD					

The place of use is shown on map filed with the SWRCB.

5. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 4.5 cubic feet per second (cfs) by direct diversion, not to exceed 750 acre-feet (af), from the Carmel River for storage in the Seaside groundwater basin using the Paso Robles Test Injection Well, the Santa Margarita Test Injection Well or the Ord Grove #1 Well. The diversion season runs from the date of permit issuance through May 31, 2004.

The permittee is only authorized to divert from groundwater storage an equivalent amount of water, less losses, to the quantity that the permittee first injects into the groundwater basin.

(000005A)

6. This permit expires May 31, 2004 for purposes of collecting water in underground storage. The time to put water to full beneficial use expires 180 days from the date of permit issuance.

(0000051)

7. For the protection of fish and wildlife, permittee shall divert only when the following instream flows are being met:

From January 7, 2004 to April 15, 2004:

In wet, normal, and below normal water years*, the permittee must cease diversion of water for the duration of each attraction event**, if the flow at the Carmel Lagoon is less than 200 cfs.

In dry and critically dry water years*, the permittee must cease diversion of water for the duration of each attraction event**, if the flow at the Carmel Lagoon is less than 150 cfs.

When flow at the Carmel Lagoon is less than an attraction event**, the permittee must divert water in accordance with a scheduled recession rate that will result in the following flows:

100 cfs at sites between Los Padres Dam and San Clemente Dam
90 cfs at sites between San Clemente Dam and River Mile 5.5
60 cfs at sites between River Mile 5.5 and the Carmel Lagoon

The permittee must cease diversion when the cumulative instantaneous rate of diversion by all diverters is greater than 80 cfs.

From April 16, 2004 to May 31, 2004:

The permittee must cease diversion of water when the flow between San Clemente Dam and the Lagoon is less than 80 cfs.

The permittee must cease diversion when the cumulative instantaneous rate of diversion by all diverters is greater than 80 cfs.

* The definitions of year type are those contained in D1632, Permit Table C.

** An attraction event is defined as 200 cfs in January, 100 cfs in February, and 75 cfs in March in dry and critically dry years. In wet, normal, and below normal years, an attraction event is 200 cfs.

(0000014)

8. When water is being diverted from the Carmel River and injected into the Seaside Groundwater Basin, the permittee shall monitor flow at the Highway 1 Bridge, and water currents, depths, and channel configuration in the Lower Carmel River below Schulte Road Bridge. The purpose of this monitoring is to ensure that the migration of adult steelhead is not blocked or impaired as a result of the permitted diversions. If any evidence of impairment or blockage is found, the permittee shall cease diverting under the temporary permit until flow increases, thereby alleviating the blockage or impairment.
9. Permittee shall install and maintain measuring devices, satisfactory to the SWRCB, which are capable of (1) measuring the instantaneous rate of diversion and the cumulative quantity of water diverted to the Seaside Basin injection wells and (2) the cumulative quantity of water extracted from the Seaside Basin. Permittee shall also ensure that the Carmel River Highway 1 gaging station is operational at all times during the diversion season.

(0110900)
(0510900)
10. Permittee shall report to the SWRCB by September 1, 2004 (a) daily compliance with the maximum rate of diversion, (b) the total quantity of water diverted under this temporary permit, (c) daily compliance with the bypass flow requirements, and (d) the quantity put to beneficial use.

(0510900)
11. In the event that the permittee fails to comply with any of the permit conditions, including the bypass flow condition, the permittee is solely responsible for any administrative civil liability.
12. Permittee shall cease all diversions under this temporary permit at any time diversions are being made pursuant to Permit 20808.

13. The source of water for the test of the Seaside Basin injection/ground water recharge project is the Carmel River. All diversions and rediversions will be accomplished using California-American Water Company (Cal-Am) facilities and the water will be supplied to the Cal-Am service area. Therefore, Carmel River water diverted under this temporary permit shall be counted when evaluating compliance with the withdrawal quantities from the Carmel River by Cal-Am as set forth in Condition 1 of SWRCB Order 95-10. The amount of water diverted under this temporary permit credited towards Condition 1 of SWRCB Order 95-10 shall be the lesser of:
 - a. The amount of water produced from the Seaside Basin in excess of 4,025 acre-feet of water (Cal-Am's share of the current estimated safe-yield of the Seaside Basin), or
 - b. The total amount of the water diverted under this temporary permit.
14. This permit does not authorize any act that results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish & G. Code § 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. § 1531 to 1544). If a "take" will result from any act authorized under this water right, the permittee shall obtain authorization for an incidental take prior to construction or operation of the project. Permittee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this permit.

(0000014)
15. The SWRCB may supervise diversion and use of water under this temporary permit for the protection of lawful users of water and instream beneficial uses and for compliance with permit conditions. Permittee shall allow representatives of the SWRCB and other parties, as may be authorized from time to time by the SWRCB, reasonable access to project works to determine compliance with the terms of this temporary permit.
16. This temporary permit is issued and permittee takes it subject to California Water Code, Division 2, Chapter 6.5, section 1425, et seq. Any temporary permit issued under this chapter shall not result in creation of a vested right, even of a temporary nature, but shall be subject at all times to modification or revocation at the discretion of the SWRCB.

(0510800)
17. Pursuant to California Water Code sections 100 and 275, and the common law public trust doctrine, all rights and privileges under this temporary permit including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the SWRCB in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the SWRCB may be exercised by imposing specific requirements over and above those contained in this temporary permit with a view to eliminating waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source.

(0000012)

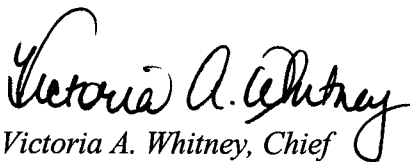
18. Issuance of this temporary permit shall not be construed as indicating SWRCB approval of any change petitions filed by MPWMD pursuant to its permits. (0510999)
19. This permit shall not be construed as conferring upon the permittee right of access to any diversion and water delivery facilities owned by Cal-Am. (0000022)

This permit is issued and permittee takes it subject to the following provisions of the Water Code:

Section 1390. A permit shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division (of the Water Code), but no longer.

Section 1391. Every permit shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article and the statement that any appropriator of water to whom a permit is issued takes it subject to the conditions therein expressed.

Section 1392. Every permittee, if he accepts a permit, does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any permit granted or issued under the provisions of this division (of the Water Code), or for any rights granted or acquired under the provisions of this division (of the Water Code), in respect to the regulation by any competent public authority of the services or the price of the services to be rendered by any permittee or by the holder of any rights granted or acquired under the provisions of this division (of the Water Code) or in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State, of the rights and property of any permittee, or the possessor of any rights granted, issued, or acquired under the provisions of this division (of the Water Code).



Victoria A. Whitney, Chief
Division of Water Rights

Dated: JAN 16 2004